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No. 75-57

In the Supreme Court of the United States

OCTOBER TERM, 1975

SAMUEL F. MANARITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the district court's imposition of a fine following his conviction denied him equal protection, and that the district court's refusal to conduct an evidentiary hearing to determine whether the government suppressed exculpatory evidence as alleged in petitioner's Section 2255 motion denied him due process.

On May 21, 1970, after a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of using extortionate means to collect an extension of credit, in violation of 18 U.S.C. 894 and 2. He was sentenced to a term of 15 years' imprisonment and fined $5,000. The court of appeals affirmed. *United States* v. *Manarite*, 434 F.2d 1069 (C.A. 2), certiorari denied, 402 U.S. 972. Subsequently, on October 28, 1970, after another jury trial in the United States District Court for the

Southern District of New York, petitioner was convicted of conspiring to transport obscene material, in violation of 18 U.S.C. 371 and 1465. He was sentenced to a term of 18 months' imprisonment, the sentence to run consecutively to that imposed on his extortion conviction, and fined $5,000. The court of appeals affirmed. *United States* v. *Manarite*, 448 F.2d 583 (C.A. 2), certiorari denied, 404 U.S. 947. On June 25, 1974, petitioner filed the instant motion to vacate judgment and sentence in his extortion conviction, pursuant to 28 U.S.C. 2255. The United States District Court for the Southern District of New York denied the motion without a hearing (Pet. App. 3a-7a), and the court of appeals affirmed without opinion (Pet. App. 1a).

1. Petitioner contends that the $5,000 fine imposed by the district court following his extortion conviction denied him equal protection because it discriminated against him, a non-indigent defendant. Following his extortion conviction, the district court ordered (Pet. App. 9a) "that the defendant [be] committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIFTEEN (15) YEARS and FINED $5,000.00. The defendant is to stand committed until the fine is paid or he is otherwise discharged according to law." On December 18, 1973, petitioner paid the fine.

Although an indigent prisoner may not be incarcerated beyond the maximum term prescribed by statute because of his involuntary nonpayment of a fine, it is well established that where, as here, a convicted defendant has the means to pay a fine, he may be imprisoned for his refusal or neglect to do so. *Tate* v. *Short*, 401 U.S. 395, 400; *Williams* v. *Illinois*, 399 U.S. 235, 242, n. 19.[1] Petitioner was sentenced under a statute permitting punishment by both

[1]Contrary to petitioner's further contention, this does not amount to inverse discrimination against non-indigents, since "[t]he State is not powerless to enforce judgments against those financially unable to pay a fine * * *" by alternative means. *Tate* v. *Short, supra*, 401 U.S. at 399, quoting *Williams* v. *Illinois, supra*, 399 U.S. at 244.

fine and imprisonment; it is clear that his sentence was not "parlayed into a longer term of imprisonment than is fixed by the statute." *Williams* v. *Illinois, supra*, 399 U.S. at 243.[2]

2. Petitioner further contends that the district court erred in denying his motion under 28 U.S.C. 2255 without a hearing. Such a hearing is not required, however, where, as here, the files and record of the case "conclusively show" that the petitioner is not entitled to any relief. 28 U.S.C. 2255. See, *e.g.*, *Moran* v. *Hogan*, 494 F.2d 1220, 1222 (C.A. 1); *Chapman* v. *United States*, 472 F.2d 117, 118 (C.A. 5), certiorari denied, 411 U.S. 970.

In his motion to vacate sentence, petitioner alleged "that counsel for the Government and counsel [Victor Roberts] for the chief prosecution witness [Phil Frimet] in fact had an agreement to the effect that Government counsel would recommend a suspended sentence for the witness in a case then pending before a State Court in exchange for his testimony and cooperation in the instant case [the extortion charge]" and that that agreement was carried out but was effectively concealed at trial[3] (Motion to Vacate Sentence, p. 3, June 25, 1974). In support of his motion, petitioner submitted an affidavit in which his wife averred that Victor Roberts had told her of an agreement that he and the federal prosecutors had reached concerning a

[2]18 U.S.C. 892 provides for a fine of not more than $10,000 or imprisonment for not more than 20 years, or both.

Additionally, in view of petitioner's payment of the committed fine and his inability to demonstrate that his period of imprisonment was (or would be) lengthened as a result of the fine, petitioner appears to lack standing to raise this claim insofar as it rests on possible extension of the term of imprisonment. See *Tileston* v. *Ullman*, 318 U.S. 44.

[3]At petitioner's trial on the extortion charge Frimet, who was awaiting sentencing on a state pornography charge, testified that he was told by federal officers not to expect favorable consideration for his prospective testimony against petitioner (Tr. 106-108). Frimet's attorney, Victor Roberts, corroborated this testimony, stating that no agreement had been made to procure Frimet's testimony (Tr. 141-143). The government attorney advised the court that he had conferred with the state prosecutor and decided to write a letter to the state sentencing court concerning Frimet's cooperation in the extortion prosecution; however, this decision had not been communicated to Frimet (Tr. 150).

sentence recommendation for Frimet in return for his testimony against petitioner.[4]

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[4]Petitioner supplemented this affidavit with the transcript of a telephone conversation between his wife and Roberts (Brief in Support of Motion to Vacate, Exh. A, pp. 3-4):

Roberts: They went to the judge and recommended a suspended sentence.

Jeanne [petitioner's wife]: They did recommend a suspended sentence, right? Did they?

Roberts: They did.

Jeanne: They recommended a suspended sentence and you told me up to this point they never did.

Roberts: They recommended it in the state court.

Jeanne: You said they only said be nice to him, they didn't recommend anything.

Roberts: They didn't recommend it in the federal court only in the state court.

Jeanne: They still recommended it though.

* * * * *

Jeanne: Didn't he tell this to Phil [Frimet] before he was giving him all?

Roberts: He never said a word. Whatever Friedman had was with me.

Jeanne: And you never told your client.

Roberts: He refused. He never told my client.

Jeanne: You never told your client.

Roberts: How am I going to tell him. I have to wait to see what the outcome is before I can tell him anything. I can't tell him if I'm not sure. I'm not going to say to a man your [*sic*] going to be given a suspended sentence when [I'm] not sure, its up to the Judge. I never tell my clients this is what I am going to do for you.

In response, the government submitted the affidavits of Roberts and of Jerome Merin, a Department of Justice attorney familiar with petitioner's prosecution. In his affidavit, Roberts denied making the remarks to petitioner's wife that were contained in her affidavit concerning promises by government attorneys, and stated that he had repeatedly rejected her numerous requests to provide an affidavit that would substantiate the representations made in her affidavit. He further stated that at no time during the extortion proceedings did anyone in or associated with the United States Government make any promises to Frimet, and that the only promise made to Frimet was in connection with his cooperation in the proceedings leading to petitioner's subsequent conviction for transporting obscene materials (Affidavit, June 27, 1974). In his affidavit Merin confirmed that "[n]o promises were made to Phil Frimet or his attorney [Roberts] with regard to [the extortion] Indictment" and that a "letter to the District Attorney of Kings County [New York] was promised well after the [extortion] trial * * * and was written with regard to Mr. Frimet's testimony in 69 Cr. 747, a pornography trial * * *" (Affidavit, June 28, 1974).

On their face, the facts alleged by petitioner were therefore insufficient to warrant either a hearing or relief. Even if the factual representations contained in his wife's affidavit were true, they would not establish an agreement between the federal government and Frimet's attorney to secure Frimet's testimony against petitioner at petitioner's extortion trial. Neither in her affidavit nor in the transcript of her telephone conversation with Roberts was there reference to the time at which the government offered to make the sentencing recommendation or to the particular prosecution of petitioner in regard to which the recommendation was made (Pet. App. 6a-7a). Her affidavit and the transcript of the telephone conversation were there-

fore entirely consistent with the affidavits of Roberts and Merin, who had personal knowledge of the sentencing recommendation agreement, and whose affidavits conclusively showed that the promises made to Frimet, about which petitioner complained, were made in connection with a proceeding that occurred after petitioner's extortion conviction. Cf. *Dalli* v. *United States*, 491 F.2d 758, 762, n. 4 (C.A. 2); *Harris* v. *United States*, 436 F.2d 591. 594-595 (C.A. 10). In any event, the affidavit in support of petitioner's application contained "[m]ere generalities [and] hearsay statements" that were insufficient to entitle petitioner to relief. *Dalli* v. *United States, supra,* 491 F.2d at 760.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.